STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2001
v	No. 215238 Macomb Circuit Court
JOSEPH ANDRE BURRELL, Defendant-Appellant.	LC No. 98-000175-FC

Before: Griffin, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to fifty to seventy-five years in prison for the second-degree murder conviction, to be served consecutive to two years for the felony-firearm conviction. We affirm.

Defendant's first two arguments on appeal go to the admission of evidence at his trial. We will not disturb a trial court's decision to admit or exclude evidence absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the trial court's ruling. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). Defendant first argues that the trial court should not have excluded evidence that another person may have shot the victim. He contends that evidence that Joshua Mayes, a friend of the victim, possessed a gun was relevant to the issue of whether defendant fired the gun that killed the victim.

In general, evidence that is relevant is admissible. *Starr, supra*, 457 Mich 497. Relevant evidence is that which tends to make the existence of a material fact more or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998); *People v Kozlow*, 38 Mich App 517, 524-525; 196 NW2d 792 (1972). When defendant cross-examined Randy Eubanks, defendant sought to introduce evidence that Mayes assaulted Eubanks with a gun earlier on the day Scott Krupa was shot. When the trial court asked how the information was relevant, defendant argued that it suggested it may have been Mayes' gun that shot the victim. The trial court disagreed, stating that "the fact there was a handgun there does not even create an inference that that handgun was somehow utilized later at

the time of the incident shooting." Later, defendant tried to introduce Joseph Balaswad's testimony that Mayes asked him to hide a gun after the shooting. Defendant claimed that the gun may have been the same caliber as the murder weapon, and argued that such a gun being on the premises at the time of the shooting was relevant as to the murder weapon. The trial court ruled that the evidence was only admissible if defendant could first establish that the gun was fired and that the projectile was consistent with the bullet that killed Krupa. Otherwise, the testimony was irrelevant. The court stated:

> Now, unless you can show and link that gun in some fashion, that it was utilized during that altercation, the fact that one possesses a gun, one can not infer that the gun was shot.
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> * * *
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> I'll allow the questioning in this fashion, you may ask this witness if he knows if there was a gun that was fired from inside the building. If he knows that fact, then you may ask him whether or not there was a nine millimeter gun inside of the building. If he knows that fact, then you could ask him who the owner of the gun was. And if he knows that fact, you can go to the next step, what happened to the gun, that he was asked to hide it. But you have to do it in this order otherwise it can never be relevant.

Under those constraints, defendant was not able to admit evidence that Mayes had a gun.

Second, defendant argues that the trial court abused its discretion when it allowed the prosecution to introduce evidence of defendant's military background. Because defendant failed to object to the evidence at the trial court level, this issue is not preserved for our review. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999); *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996). Furthermore, defendant discussed his military experience in detail in his own testimony, explaining that he was honorably discharged after suffering a knee injury while fighting forest fires for the Army. We see no reason why this evidence would be unfairly prejudicial to defendant. *People v Mills*, 450 Mich 61, 74-75; 537 NW2d 909 (1995).

Defendant's third argument on appeal, that he was denied the effective assistance of counsel by his trial counsel's failure to object to evidence of defendant's military background, is also not properly preserved for our review. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *Snider*, *supra*, 239 Mich App 423. Accordingly, our review is limited to errors apparent from the existing record. *Snider*, *supra*, 239 Mich App 423; *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). It appears that defendant's trial counsel allowed the prosecution to introduce evidence of defendant's military record as a matter of trial strategy. We will not substitute our judgment in matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Furthermore, we find the evidence relevant to whether defendant was capable of shooting the victim, and whether he intended to cause the victim's death. Defense counsel is not required to raise a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997); *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Therefore, defendant's trial counsel did not mistakenly fail to object to the evidence.

Defendant next argues that the trial court abused its discretion when it denied defendant's motion for a mistrial, which followed an evacuation of the courtroom for a bomb threat. Defendant argues that the jury was tainted by contact with the officer in charge of his case, and with another judge. We will only find an abuse of discretion where the denial of a mistrial deprived defendant of a fair and impartial trial. *People v Manning*, 434 Mich 1, 7; 450 NW2d 534 (199); *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Although contact between jurors and non-jurors involved in the case is a serious matter, "due process does not require a new trial every time a juror has been placed in a potentially compromising situation." *People v Grove*, 455 Mich 439, 472; 566 NW2d 547, (1997) (quoting *Smith v Phillips*, 455 US 209, 217; 102 S Ct 940; 71 L Ed 2d 78 (1982)); *People v Hayes*, 126 Mich App 721, 730; 337 NW2d 905 (1983). In this case, the jury had only incidental contact with people while they were evacuated for a bomb threat. Detective Haythaler, who the jury knew as the officer in charge of defendant's case, told the jury he would find out whether they could leave, and informed them that the court building would be closed until 5:15 p.m. Judge Bucci advised the jury that they could leave. The jury had no other contact with anyone related to the case.

The trial court examined each juror individually, and each said that the events of the previous day would have no effect on his or her ability to decide the case based only on the evidence presented in the courtroom. Juror testimony that extraneous events and information would not effect the verdict has repeatedly been held to justify a trial court's denial of a mistrial. See, e.g, *People v Fox*, 232 Mich App 541, 558; 591 NW2d 384 (1998); *People v. Fetterley*, 229 Mich App 511, 546; 583 NW2d 199 (1998); *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995); *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 739 (1994). The contact in the instant case was far less likely to cause prejudice than the situations in the above cases. The only contact in the present case had nothing to do with defendant or with any issues at trial. Defendant does not contend that Judge Bucci or Detective Haythaler did anything more than assist the jury in the moments after they were evacuated from the courtroom. Accordingly, we find no abuse of discretion in the trial court's denial of defendant's motion for a mistrial.

Next, defendant contends that the assistant prosecutor made two remarks constituting prosecutorial misconduct. We review issues of prosecutorial misconduct on a case by case basis, examining the prosecutor's conduct in the context of the record. *Noble*, *supra*, 238 Mich App 660; *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). The question we must answer is whether the alleged misconduct denied defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

Defendant first argues that the assistant prosecutor impermissibly appealed to the jury's sympathy in his closing argument. A prosecutor may not appeal to the jury's sympathy. *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). However, after examining the remarks in the context of the complete closing arguments, we do not find the statements denied defendant a fair trial. Although the assistant prosecutor's remarks seem to have been aimed at arousing sympathy in the jury, they were brief, comprising only a small fraction of his closing argument. Additionally, the prosecutor did not urge the jury to take the impact on the victim's family into account when rendering its verdict, and the trial court delivered curative instructions in its jury instructions.

We do not find that the remarks rise to the level of prosecutorial misconduct. See *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999).

Defendant also argues that the assistant prosecutor injected race into the trial by referring to Colin Ferguson, as the New York "subway shooter." We find no merit in this argument, which is not preserved for our review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). During his closing argument, the assistant prosecutor stated:

> Judge Donofrio will tell you that the People do not have to establish a motive. If we had to prove a motive in every case, it would mean that a person could commit a senseless crime with impunity. Some of you have heard of the case of Colin Ferguson on a New York Subway who began shooting people. There was no motive other than maybe he was a bad person or an evil person. But, he didn't even know these people who he shot.

Defendant contends that this statement, alone, injected race into his trial. Defendant cites no authority for the implied proposition that reference to a notorious black man, who is unrelated to his own case, would inject race into his trial. In fact, the assistant prosecutor did not mention Ferguson's race to the jury. Even if the jury knew Ferguson's race, there is no evidence from the record that the assistant prosecutor intended to inflame the jury with a "blatant injection of race as an issue in the trial." *People v Springs*, 101 Mich App 118, 125; 300 NW2d 315 (1980). Accordingly we cannot find that any remarks by the assistant prosecutor denied defendant a fair trial.

Defendant next contends that the trial court abused its discretion when it sentenced him to fifty to seventy-five years for his conviction for second-degree murder, a crime which carries a maximum sentence of life in prison. MCL 750.317; MSA 28.549. The sentencing guidelines provided for a minimum sentence range of ten to twenty-five years in prison. A trial court abuses its discretion when it imposes a sentence disproportionate to the seriousness of the offense, considering the circumstances of the crime and the defendant's history. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999). We carefully scrutinize a trial court's departure from the sentencing guidelines on appeal. *Cain*, *supra*, 238 Mich App 132.

Although the sentencing guidelines are not an absolute requirement, they are "a useful barometer to measure the proportionality of a sentence." *People v Kowalski*, 236 Mich App 470, 473; 601 NW2d 122 (1999). While the trial court has broad discretion to tailor sentences, it must support sentences departing from the guidelines with a specific explanation. *People v Rockey*, 237 Mich App 74, 79; 601 NW2d 887 (1999); *Kowalski*, *supra*, 236 Mich App 473. Considering the circumstances of the case, the sentence must reflect the seriousness of the crime committed. *Rockey*, *supra*, 237 Mich App 79. That the sentence reflects the seriousness of the crime is more important than whether it adheres to the sentencing guidelines. *People v Lemons*, 454 Mich 234, 260; 562 NW2d 447 (1997); *People v Castillo*, 230 Mich App 442, 447-448; 584 NW2d 606 (1998). The maximum sentence for a crime is proportionate where the circumstances place the offender in the most serious class with respect to the particular crime. *Milbourn*, *supra*, 435 Mich 654.

In the instant case, the trial court departed from the sentencing guidelines because of the nature of defendant's offense, citing the following reasons: (1) defendant killed Krupa when he "emptied a 9mm pistol into a group of teenagers," (2) defendant was older then his victims, and had military training, (3) defendant was shooting at people he did not know, and (4) defendant did not express remorse and protested his innocence in the face of eye witnesses. The trial court noted that a "drive-by shooting" was an egregious offense to both personal and neighborhood security, and that the callousness of defendant's behavior demonstrates that he is "a most dangerous and serious threat to the community. Where the sentencing guidelines fail to reflect the seriousness of an offense, a sentencing court may depart from the guidelines. *People v Houston*, 448 Mich 312, 321-323; 532 NW2d 508 (1995). It is permissible to consider "the factors of societal protection, rehabilitation, deterrence, and punishment," and the fact that society may need "protection from [a] defendant for a long time." *People v Carson*, 220 Mich App 662, 678; 560 NW2d 657 (1996).

In the instant case, the trial court appropriately considered the nature and severity of defendant's crime. *People v Castillo*, 230 Mich App 442, 448-449; 584 NW2d 606 (1998). The sentencing guidelines do not adequately account for the offense defendant committed. Defendant received points under the sentencing guidelines for killing a person, having the intent to injure or acting with gross negligence, and for a pattern of three or more crimes against property. Despite defendant's lack of a prior criminal record, the guidelines do not account for the random, unprovoked nature of defendant's drive-by shooting. Furthermore, the trial court properly considered defendant's lack of remorse as indicative of a low potential for rehabilitation. *Houston*, *supra*, 448 Mich 321-323. Accordingly, we hold that the trial court did not abuse its discretion when it made an upward departure from the recommended sentencing guidelines.

Defendant presents his final issue on appeal in an in propria persona supplemental brief, challenging the trial court's denial of his motion to suppress his confession. A trial court's ruling on a motion to suppress a confession is entitled to deference. *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996); *People v Faucett*, 442 Mich 153, 170; 499 NW2d 764 (1993). When reviewing a ruling on a motion to suppress evidence of a confession, the record is reviewed de novo, but the lower court's decision will only be disturbed if its factual findings were clearly erroneous. *People v Kowalski*, 230 Mich App 464, 471-472; 584 NW2d 613 (1998). Although defendant attempts to distinguish his rights to remain silent and to counsel from the issue of whether his statement was voluntary, the issue of voluntariness itself goes to the validity of a defendant's waiver of his right to remain silent and his right to counsel. *People v Bender*, 452 Mich 594, 602-605; 551 NW2d 71 (1996).

Statements made during a custodial interrogation are only admissible where the accused voluntarily, knowingly, and intelligently waived his Fifth and Fourteenth Amendment rights to remain silent and to counsel. *Bender*, *supra*, 452 Mich 602, 611-613; *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999); *see also Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966). The uncontested evidence at defendant's *Walker*[1] hearing

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

established that defendant was apprised of his *Miranda*[2] rights, he understood those rights, and agreed to speak to the police without requesting an attorney or asking for the questioning to stop. *People v Daoud*, 462 Mich 621, 634, 636-637; 614 NW2d 152 (2000); *Abraham*, *supra*, 234 Mich App 645. Although defendant notes that his *Miranda* rights were delivered orally, there is no requirement that a defendant be advised of his rights in writing. *People v Brannon*, 194 Mich App 121, 130-131; 486 NW2d 83, lv den 441 Mich 887 (1992). Moreover, a *Miranda* reading is generally sufficient to apprise a defendant of both his Fifth and Sixth Amendment rights to counsel. *Patterson v Illinois*, 487 US 285, 298-299; 108 S Ct 2389; 101 L Ed 261 (1988); *People v McElhaney*, 215 Mich App 269, 276-277; 545 NW2d 18 (1996). Hence, the trial court did not err when it concluded that defendant's statement was given voluntarily.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1996).